

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

J. PAUL and PATRICIA PRESEALT, :
Individually, and as partners :
of 986 ASSOCIATES, LTD. :
 :
 :
v. : Civil No. 1:02-CV-167
 :
CITY OF BURLINGTON, :
STATE OF VERMONT :
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 :
 :
_____ :

RULING ON MOTION TO DISMISS
AND CROSS MOTIONS FOR SUMMARY JUDGMENT
(Papers 27, 39, 57)

In this suit, the plaintiffs challenge the addition of a fiber optic cable to poles which support utility lines traversing their property. The parties have filed cross motions for summary judgment. For the reasons set forth below, the plaintiffs' Motion for Partial Summary Judgment is DENIED, and the defendants' Motion for Summary Judgment is GRANTED.

I. Background

On cross motions for summary judgment, each moving party has an initial burden of informing the Court of the basis for its motion and of identifying the absence of a genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, each motion for summary judgment is supported by affidavits or

other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue in dispute. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The plaintiffs' property, which is located near Lake Champlain in Burlington, Vermont, is currently bisected by a public bike path which is located on a portion of a former railroad right-of-way. This former railroad right-of-way and current bike path has been the subject of litigation for decades; accordingly, the factual background of this dispute has been set forth exhaustively in a variety of state and federal opinions. Familiarity with these rulings is presumed. See, e.g., Preseault v. I.C.C., 494 U.S. 1 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996); Preseault v. I.C.C., 853 F.2d 145 (2d Cir. 1988), aff'd, 949 U.S. 1 (1990); State v. Preseault, 163 Vt. 38 (1994); Trustees of the Diocese of Vermont v. State of Vermont, 145 Vt. 510 (1985).

The issue underlying this lawsuit is whether the City of Burlington has the authority to add a fiber optic line to poles located in the bike path and which already support electrical transmission lines. See Paper 14 at para. 14.

The plaintiffs believe this controversy presents a federal question under 28 U.S.C. § 1331. See Amended Complaint (Paper 14) at para. 5. In Count I, they ask the Court to enforce the rulings of the Federal Circuit in Preseault v. United States, 100 F.3d at 1541, and the United States Court of Federal Claims, No. 90-4043L (Filed May 22, 2001) (appended to Paper 14), which they construe as “defin[ing] the nature and extent of the only easement over the[ir] Property” Paper 14 at para. 17. In Count II, they allege the defendants’ joint actions, which resulted in the installation of the fiber optic cable, have deprived them of their property rights in violation of 42 U.S.C. § 1983. See Paper 14 at 5.

II. Discussion

A. Motion to Dismiss

In their Motion to Dismiss (Paper 57), the defendants argue that the Rooker-Feldman doctrine deprives this Court of jurisdiction over this case. Under the Rooker-Feldman doctrine, “lower federal courts lack subject matter jurisdiction over claims that effectively challenge state court judgments.” Kropelnicki v. Siegel, 290 F.3d 118, 128 (2d Cir. 2002). In addition, the doctrine bars review of “claims that are inextricably intertwined with state court determinations.” Id. (citations and quotations omitted).

"[W]here the claims were never presented in the state court proceedings and the plaintiff did not have an opportunity to present the claims in those proceedings, the claims are not 'inextricably intertwined' and therefore are not barred by Rooker-Feldman." Id. (citation and quotations omitted). This case involves the plaintiffs' challenge to the installation in 2001 of a fiber optic cable within an existing utility easement which crosses their property. None of the other state cases involved a challenge to this fiber optic cable. The Rooker-Feldman doctrine, therefore, does not bar this Court from assuming jurisdiction.

B. Cross Motions for Summary Judgment

The essence of the plaintiffs' argument is that federal law, as interpreted by and embodied in the 1996 ruling of the United States Court of Appeals for the Federal Circuit and the 2001 ruling of the United States Court of Federal Claims, prohibits the defendants from installing fiber optic cable. They argue that the only current interest defendants may claim in their property is strictly related to the bike path addressed in their prior federal suits.

The effect of the prior federal litigation is more limited. The Federal Circuit determined, inter alia, that an historic railroad right-of-way across their property had been

abandoned; therefore, the defendants' subsequent establishment of a bike path in the railroad bed, and ostensibly pursuant to federal authority, constituted a taking of private property. See 100 F.3d at 1552-54. On remand, the Court of Federal Claims determined the compensation to which the plaintiffs were entitled as a result of the bike path taking. See Order (appended to Paper 14) at para. 4 ("plaintiffs are entitled to an award of \$234,000.00 as just compensation for the occupation of their property by the City of Burlington under the authority of the Federal Government.").

Neither of these cases addresses the interest asserted in this case: the defendants' right to install or maintain utility lines in an already existing utility right-of-way. The cases upon which plaintiffs rely are distinguishable since they involved federal statutes relating to the creation and abandonment of the federal railway system. The fact that this fiber optic line also is located within the abandoned railway/created bike path does not mean the same federal and state provisions are applicable. The fiber optic line is also placed within and as part of an existing utility easement, a property interest independent of the one granted the plaintiffs by the litigation involving the bike path. See Preseault v. I.C.C., 494 U.S. at 21 (Justice O'Connor, concurring) ("Determining what interest petitioners would have

enjoyed under Vermont law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim.").

"[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (citations and quotations omitted). Thus, resolution of this matter requires application of Vermont law. Cf. Preseault v. I.C.C., 853 F.2d at 150 ("State law generally determines what interest is retained by a property owner whose land is subject to a railroad right-of-way . . .").

Several Vermont statutes are dispositive. Title 30 V.S.A. § 2513 provides:

(a) A company subject to the jurisdiction of the public service board may erect and maintain its telecommunications or electric transmission and distribution lines and facilities along the sides of railroad tracks within the limits of lands owned or held by a railroad on paying reasonable compensation to the railroad. If they cannot agree upon the amount of reasonable compensation, it shall be determined by the transportation board which shall ascertain the compensation.

(b) Wireless telecommunication facilities may be erected and maintained within the limits owned or

held by a railroad in the same manner as other utility facilities.

In addition, 30 V.S.A. § 2514 provides:

A line erected as authorized in section 2513 of this title shall remain the property of such telegraph, telephone or electric company, and shall not pass by sale, transfer or mortgage made by the railroad corporation, of the lands upon which the line is erected, nor shall the line be liable to attachment or levy of execution against such railroad corporation.

Lastly, 30 V.S.A. § 2515 states:

When a person or corporation is about to erect a line of telegraph or telephone wires, in and along a highway within a town, in and along which a line of poles has already been erected by another person or corporation for a similar purpose, the transportation board or selectmen of such town shall have the right to permit and may require the new line to be attached to the poles already standing,
. . . .

The poles and utility lines traversing plaintiffs' property were placed as a result of transfers to the defendants from a now defunct railroad. See, e.g., Preseault v. United States, 100 F.3d at 1530. Long ago, the Vermont Supreme Court held:

[W]hen an electric line has sprung into being upon lands held for railroad use it is enacted by V.S. 47, § 9711 [now 30 V.S.A. § 2514] that line shall remain the property of the electric company; it shall not pass by any transfer, voluntary or involuntary, from the railroad corporation. This

statute makes the electric line the permanent property of the electric company independent of railroad use. Logically it results that when the railroad use is abandoned, the right to maintain a then existing independent electric line continues.

Proctor v. Cent. Vt. Pub. Serv. Corp., 116 Vt. 431, 434

(1951). The plaintiffs concede that "[t]he installation of the City's electric transmission line, which was erected pursuant to Vermont statute (now 30 V.S.A. § 2513, formerly V.S. § 9710) predates the abandonment and judicial opinions." Plaintiffs' Memorandum of Law (Paper 28) at 3, para. 6. It cannot reasonably be disputed that, under Vermont law, the City may maintain existing utility lines on the plaintiffs' property. See Memorandum in Opposition to Cross Motion (Paper 49) at 5 (plaintiffs do not dispute defendants right to maintain lines).

Nevertheless, the plaintiffs argue the City's right to maintain existing electric lines does not grant it a right to install a fiber optic cable on existing utility poles. Read together, 30 V.S.A. §§ 2513(b) and 2515 unequivocally grant the City such a right in this case, regardless of the fact that the utility easement arose as a result of a now defunct railway. See Dessureau v. Maurice Memorials, Inc., 132 Vt. 350, 352 (1974) ("It has long been the law of this State, . . . that a railroad is an improved highway, and property taken for its use by legislative authority is property taken for public

use and is the same as if it were taken for any other highway.").

It is true that, as a general proposition, "the owner of an easement cannot materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon." Chevalier v. Tyler, 118 Vt. 448, 454 (1955). The record before the Court, however, does not raise a material factual dispute in this regard. The fiber optic line at issue is one rather unremarkable wire placed on poles which already support several similar lines. See Burns Affidavit (Paper 44) at paras. 4 ("In simplistic terms, video, voice and data is transmitted over fiber optic cable through the process of converting electrical energy into light energy, at which time the converted signal is transmitted over the fiber optic cable to its destination, where the light energy is then converted back to electrical energy.") and 8 ("Installation of the fiber optic line placed no additional restriction on what can be erected and grown by Plaintiffs beyond the restrictions that existed prior to the installation of that line."); Defendants' Local Rule 7.1(c)(1) Statement (Paper 41) at Ex. F (picture of line).

Plaintiffs' protestations notwithstanding, as a matter of law, the single fiber optic cable at issue does not materially increase the scope of the easement, nor does it impose a new

burden on the servient estate. Cf. Mumaugh v. Diamond Lake Area Cable TV Co., 183 Mich. App. 597 (1990) (Cable Communications Act of 1984 grants cable television companies a federal right to access easements dedicated to a compatible use held by a utility company). In short, the record does not support plaintiffs' claim that the installation of one fiber optic cable constitutes a violation of their rights.

Conclusion

The Defendants' Motion to Dismiss is DENIED. The Plaintiffs' Motion for Partial Summary Judgment is DENIED. The Defendants' Motion for Summary Judgment is GRANTED.

SO ORDERED.

Dated at Brattleboro, Vermont, this ____ day of February, 2004.

J. Garvan Murtha
United States District Judge